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no relief in equity.¹¹ The court attempted to distinguish the two kinds of fraud and gave, by way of dictum, the following examples of facts constituting extrinsic fraud: "Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest."¹²

The state of the law on the subject as it is applied, therefore, presents a situation in which the general line of cleavage between extrinsic and intrinsic fraud is fairly well defined and understood. In general, extrinsic fraud seems to be fraud in the employment of the machinery of justice which keeps the defrauded party from presenting his case in the original action.¹³ All other fraud, including fraud in the machinery of justice which does not operate to prevent a full hearing in court, is held to be intrinsic and is concluded by the judgment rendered. The California courts have considered perjury as falling within the latter category of fraud.

In conclusion, therefore, one can merely recognize the impossibility of attempting by generalization to draw a fine line of distinction between the two classes of fraud, noting, however, the apparent tendency on the part of the courts towards some liberality in allowing relief against judgments. In the words of Mr. Justice Holmes, in the ultimate analysis the distinction "depends on circumstances."¹⁴

W. C. B.

LANDLORD AND TENANT: TERMINATION OF LEASE AFTER NOTICE TO QUIT—It frequently happens that after a notice to pay rent or quit is served, the tenant remains in possession lawfully

¹¹ This is the general rule. Note 10 L. R. A. (N.S.) 216, 2 Freeman on Judgments, § 489, p. 861.

¹² State of California v. McGlynn, supra, n. 3. The tests here given follow those outlined in United States v. Throckmorton, supra, n. 5. See note 6, supra (keeping defendant in ignorance of the suit); Flood v. Templeton (1907) 152 Cal. 148, 92 Pac. 78, 13 L. R. A. (N.S.) 579, (false promise of a compromise); Baker v. O'Riordan (1884) 65 Cal. 368, 4 Pac. 232 (unauthorized appearance by attorney); People v. Perris Irr. Dist. (1904) 142 Cal. 601, 606, 76 Pac. 381 (corruption of attorney regularly employed). There is authority that breach of a fiduciary relationship constitutes extrinsic fraud. See the contemporaneous case of Morgan v. Asher, supra, n. 1; Sohler v. Sohler (1902) 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Aldrich v. Barton (1902) 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43; Silva v. Santos (1903) 138 Cal. 536, 71 Pac. 703; also dicta in Tracy v. Muir (1907) 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; Campbell-Kawannanaka v. Campbell (1907) 152 Cal. 201, 92 Pac. 184; Nicholson v. Leatham (1915) 28 Cal. App. 597, 153 Pac. 965, 155 id. 98.

¹³ In order to obtain relief plaintiff must show that he had a good defense on the merits of the original action which the fraud of the defendant prevented him from urging. Davis v. Chalfant (1889) 81 Cal. 627, 12 Cal. 972; Collins v. Scott (1893) 100 Cal. 446, 34 Pac. 1085; Lee v. Colquhoun (1917) 175 Cal. 16, 164 Pac. 894.

¹⁴ Moyer v. Peabody (1909) 212 U. S. 78, 84, 53 L. Ed. 410, 29 Sup. Ct. Rep. 235. This conclusion was reached by the eminent jurist in his attempt to define "due process of law" in the light of five hundred sixty-seven cases involving interpretation of the "due process" clause of the Constitution. Collins, The Fourteenth Amendment and the States, p. 114.

either by virtue of the withdrawal of the notice or by payment of the rent. Under such circumstances is the tenant's subsequent holding under the old or a new lease? That a withdrawal of such a notice by the landlord before the three days have expired prevents the expiration of the lease is the holding in *Downing v. Cutting Packing Company*.¹ Under the facts of that case the final decision cannot be questioned. The lessee's surety had deposited a sum in a bank on which the landlord was privileged to draw whenever the tenant defaulted. The landlord served a three-day notice to pay rent or quit, and before the three days had expired he collected the rent for the current month from the bank under the suretyship agreement. Subsequent payments having become due, the question arose as to the surety's liability for them. The surety contended that the service of the notice ended the tenancy, and that the lessee's later holding was under a new lease which the surety did not guarantee. That the original lease, and therefore the liability of the surety, remained unimpaired, seems clear from a reading of the sections of the Code of Civil Procedure relating to notices to quit. Section 1161 declares that "A tenant of real property, for a term less than life, is guilty of unlawful detainer . . . when he continues in possession . . . without the permission of his landlord . . . after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment stating the amount which is due, or possession of the property, shall have been served upon him. . . ." Subdivision 3 of section 1161 states "Within three days after the service of the notice, the tenant, or any subtenant in actual possession of the premises, or any mortgagee of the term, or any other person interested in its continuance, may perform the covenants or conditions of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture". The evident meaning of section 1161 is that the service of the three days' notice does not end the lease, but gives notice to the tenant that unless the rent is paid the lease will end. Certainly with the payment of rent in the principal case the lease was not forfeited, and the surety was properly held liable for subsequent payments.

The decision draws a distinction between two kinds of notices to quit which is entirely sound.² The distinction is between notices to perform certain covenants of the lease or quit, and plain notices to quit unaccompanied by an alternative provision, where the tenancy is from year to year, at will, or where the lease provides for termination by notice. In the first case the lease is ended only by the occurrence of a forfeiture;³ in the second the mere service of the notice operates to terminate the lease on the day set.⁴ A

¹ (June 4, 1920) 59 Cal. Dec. 612, 190 Pac. 455, reversing 28 Cal. App. Dec. 1275. Rehearing denied July 1, 1920.

² Cf. 2 Tiffany on Landlord and Tenant, § 274, p. 1745.

³ Cal. Code Civ. Proc. § 1161, subdiv. 2, 3.

⁴ *Wisner v. Richards* (1911) 62 Wash. 429, 113 Pac. 1090, Ann. Cas. 1912D 160; *In re Sweeney* (1916) 159 N. Y. Supp. 984.

notice of either class may be withdrawn before the day set with the effect of preventing a termination of the lease.⁵ A plain notice to quit requires for withdrawal the consent of both parties.⁶ But a notice providing in the alternative for the performance of covenants in the lease or surrender of the premises may be withdrawn by the landlord alone.⁷ In the latter situation the landlord wants the tenant to perform, by payment of the rent or otherwise, and in most cases does not desire a forfeiture of the lease. The service of the notice at most works only a potential forfeiture,⁸ and as the landlord is the person entitled to enforce it, his waiver of it is effective without the consent of any other party.

The implication in the principal case is that the lease is ended with the expiration of the three-day period, if the rent has not been paid nor the notice withdrawn. If this be true, then the tenant who later pays the rent and continues in possession, as he has a right to do, holds under a new lease. That the law is such is highly doubtful. Unlawful detainer proceedings are the creation of statute,⁹ and were unknown to the common law. Their purpose is to provide an additional and speedy means for the landlord to get possession of premises wrongfully withheld from him by the tenant.¹⁰ The unlawful detainer action is designed for the protection of the landlord; he is the moving party, and the abrogation of the lease is for his benefit. It is submitted that it is entirely in harmony with the policy of these statutes, as well as with the strict letter of them, that the landlord be allowed to waive his right to the forfeiture of the lease even after the expiration of the three day period.

The language of our code supports this conclusion. Section 1161 of the Code of Civil Procedure (quoted above) provides that a tenant who holds over after the three days is guilty of unlawful detainer. Section 1174 declares "If . . . the finding of the court be in favor of the plaintiff and against the defendant, judgment

⁵ The rule in England, at least as to plain notices to quit, is otherwise. There after a withdrawal by mutual consent the lease nevertheless expires, and the later holding is under a new tenancy, *Tayleur v. Wildin* (1868) L. R. 3 Exch. 303. A dictum in *Western Union Tel. Co. v. Pennsylvania R. Co.* (1903) 120 Fed. 362, 385, accords with the English view.

⁶ *Brown v. Montgomery* (1902) 21 Pa. Super. Ct. 262; *Supplee v. Timothy* (1889) 124 Pa. 375, 16 Atl. 864; *Wisner v. Richards*, supra n. 4.

⁷ *Downing v. Cutting Packing Co.* supra n. 1; *Whitney v. Swett* (1850) 22 N. H. 10, 53 Am. Dec. 228. The statement of the rule relating to withdrawal without distinguishing between the two classes of notices is the cause of much confusion; see, for example, 24 Cyc. 1334; note to *Wisner v. Richards*, supra n. 4, in Ann. Cas. 1912D 162.

⁸ *Hodgkins v. Price* (1884) 137 Mass. 13.

⁹ 2 *Tiffany on Landlord and Tenant*, § 272, p. 1716.

¹⁰ To make such statutes effective various additional rights are given the plaintiff. Thus any kind of counterclaim or cross complaint is prohibited, *Arnold v. Krigbaum* (1915) 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D 370; equitable defenses are barred in most jurisdictions, 2 *Tiffany on Landlord and Tenant*, § 276, p. 1777; but they are permitted in California, *Simon Newman Co. v. Lassing* (1903) 141 Cal. 174, 74 Pac. 761; *Ogle v. Hubbel* (1905) 1 Cal. App. 357, 82 Pac. 217; the period of answer is shortened from ten to three days, Cal. Code Civ. Proc. § 1167; and the plaintiff may under certain circumstances amend his complaint without giving the defendant additional time to plead, Cal. Code Civ. Proc. § 1173.

shall be entered for the restitution of the premises; and if the to perform the conditions or covenants of the lease or agreement proceedings be for an unlawful detainer after neglect, or failure under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement." But the lease is not even finally determined by such judgment, for the latter portion of the same section declares that if the tenant pays the amount of the judgment within five days "the judgment shall be satisfied and the tenant be restored to his former estate." And at any time within thirty days after the judgment the tenant may, upon a showing of hardship, be relieved against the forfeiture of his lease and be restored to his former estate, under section 1179. The rule to be deduced from these sections is that the expiration of the three-day period does not determine the lease, but that a judgment for the landlord terminates the lease, subject to a condition subsequent.¹¹ That condition is the satisfaction of the judgment under section 1174 or section 1179. Thus payment of the rent and costs at any time before judgment, and at any time thereafter in accordance with either section 1174 or 1179, has the effect of restoring the old lease.¹²

G. W. D.

MUNICIPAL CORPORATIONS: POWERS OF IMPROVEMENT DISTRICT OUTSIDE ITS OWN LIMITS—As a general rule, a municipal corporation cannot exercise its powers beyond its own boundaries.¹ If, however, this right is necessarily or impliedly in or incident to the powers expressly granted, such action is legal.² Thus, if a city has been given the power, either in its charter or by general statutes, to construct a sewer system and it is found necessary to go outside the municipal boundaries to obtain an outlet, the power so to act must necessarily be implied.³ In construing the power of a municipality to act outside its boundaries, then, we must look to its

¹¹ See *Agoure v. Plummer* (1917) 175 Cal. 543, 166 Pac. 311.

¹² *Voorhies v. Cummings* (1899) 42 App. Div. 260, 58 N. Y. Supp. 1120. There the statute (New York Code Civ. Proc. § 2253) provided that "the issuing of a warrant for the removal of a tenant from demised premises cancels the agreement for the use of the premises . . . and annuls accordingly the relation of landlord and tenant." After the warrant was issued the rent was paid, and the original lease was held to remain in effect.

¹ *McBean v. Fresno* (1896) 112 Cal. 159, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794; *Farwel v. City of Seattle* (1906) 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *Cochran v. Village of Park Ridge* (1891) 138 Ill. 295, 27 N. E. 939; *Coldwater v. Tucker* (1877) 36 Mich. 474, 24 Am. Rep. 601; *Manning v. Devil's Lake* (1904) 13 N. D. 47, 99 N. W. 51; *Schneider v. Menasha* (1903) 118 Wis. 298, 95 N. W. 94, 99 Am. St. Rep. 996.

² *Von Schmidt v. Widber* (1894) 105 Cal. 151, 157, 38 Pac. 682; *South Pasadena v. Pasadena Land etc. Co.* (1908) 152 Cal. 579, 590, 93 Pac. 490; *Hyatt v. Williams* (1906) 148 Cal. 585, 84 Pac. 41; *San Pedro v. Southern Pac. Ry. Co.* (1894) 101 Cal. 333, 35 Pac. 993; 1 *Dillon, Municipal Corporations* (5th ed.) § 237.

³ *McBean v. Fresno*, supra, n. 1; *Langley v. City of Augusta* (1903) 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Cochran v. Village of Park Ridge*, supra, n. 1; *Minnesota etc. Land Co. v. Billings* (1901) 111 Fed. 972, 50 C. C. A. 70; *Coldwater v. Tucker*, supra, n. 1; *Willson v. Boise City* (1899) 6 Idaho 391, 55 Pac. 887.